STATE OF MICHIGAN

COURT OF APPEALS

FRANKENMUTH MUTUAL INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED April 11, 2006
v	No. 265176 Bay Circuit Court
ARTHUR P. DORE, Defendant-Appellee.	LC No. 04-003183-CK

Before: Kelly, P.J., Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by leave granted[1] from an order denying its motion for summary disposition and dismissing its claim to recoup attorney fees in this action for declaratory relief. We reverse.

Plaintiff brought a declaratory action to determine whether it owed a duty to defend and indemnify defendant in three personal injury suits filed in Idaho and Florida. Plaintiff insured defendant under a homeowner's liability policy, which also provided personal injury liability coverage. This policy provided that plaintiff would indemnify and defend its insured against claims made or suits brought "against an insured for damages because of bodily injury or property damage caused by an occurrence to which [the] coverage applie[d]." The policy defined "occurrence" as "an accident, including continuous or repeated exposure to the same general harmful conditions, which results, during the policy period, in (a) bodily injury; or (b) property damage." The policy also contained the following relevant language:

> **COVERAGE E – Personal Liability** and **COVERAGE F – Medical Payments to Others** do not apply to bodily injury or property damage:

[1] This Court granted plaintiff's application for leave to appeal in *Frankenmuth Mut Ins Co v Dore*, unpublished order of the Court of Appeals, entered November 1, 2005 (Docket No. 265176).

a. which may be reasonably expected from the intentional or criminal acts of an insured or which is in fact intended by an insured.

b. Arising out of or in connection with a business engaged in by an insured.

Further, the term "business" is defined as including "trade, profession or occupation."

Starting around 1979, plaintiff began promoting "Toughman Contests," which were elimination prizefight tournaments usually involving "subnovice" fighters. Participants would engage in several fights over a period of two or three days with the ultimate winner being determined by elimination. These fights often involve inexperienced fighters in questionable physical condition and are usually set up to avoid regulation by state boxing authorities. Participants in Toughman contests have been injured or killed in the past. The Toughman contests have generated approximately $50 million in revenue since their beginning.

Defendant has held the registered trademark to the name "Toughman Contest" since 1981. The trademark was subsequently transferred to corporations owned by defendant and is now owned by AdoreAble Promotions, Inc., which is owned by defendant's children. Defendant does not own any part of AdoreAble Promotions and is not an officer or employee of that corporation. Defendant asserts he has no ownership interest in the corporations that own the "Toughman" brand or conduct the contests. During the relevant time period defendant was the President of the American Boxing and Athletic Association, [ABAA] a nonprofit charitable organization formed under §501(c)(3) of the Internal Revenue Code. The ABAA leases the Toughman Contest name from AdoreAble Promotions. Defendant and the ABAA are actively involved in organizing and promoting Toughman contests throughout the United States.

Defendant was named as a defendant in two wrongful death cases and one personal injury case arising from Toughman Contests in Boise, Idaho, in 2002 and Sarasota, Florida, in 2003. These cases arise from the deaths of two Toughman participants and severe brain injuries sustained by a third fighter. Although he was unpaid, defendant was actively involved in the promotion and organization of each contest. Plaintiff filed its declaratory action against defendant to determine whether it owed duties to defend or indemnify defendant in the Idaho and Florida cases.

Plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that the Idaho and Florida claims against defendant fell outside the scope of the policy for three reasons: (1) injuries were expected or foreseeable in these amateur fights, so they cannot be considered accidents and thus are not "occurrences" covered by the policy; (2) the underlying plaintiffs' injuries arose out of or in connection with a business engaged in by defendant and so are excluded under the policy; and (3) the underlying plaintiffs' injuries were reasonably expected and so fell within the "intentional conduct" policy exclusion. Plaintiff also argued that there was no genuine issue of material fact that it could recover defense costs and fees it paid in the Idaho and Florida cases since it provided a defense under an express reservation of rights.

Defense counsel argued that, although defendant was at one time actively involved in the Toughman Contest business, he was no longer in the business, but instead, merely contributed

his time on a voluntary basis without payment. Further, although injuries may be foreseeable in boxing, the possibility that certain unknown fighters might suffer an unknown injury at some point did not render the injury expected, intentional, or otherwise non-accidental. Defendant also argued that plaintiff never filed an action to recover attorney fees it had paid.

The trial court ruled that there was no question of fact that the injuries were accidental and, therefore, that they were "occurrences" within the meaning of the policy and the intentional conduct exclusion did not apply. The court, however, ruled that the case could proceed to trial to determine whether the business exclusion in the policy applied to the claims against defendant. Plaintiff now appeals by leave granted.

On appeal, plaintiff claims that the trial court erred in denying plaintiff's motion for summary disposition based on the business exclusion. We agree.

"[T]his Court applies a de novo standard when reviewing motions for summary disposition made under MCR 2.116(C)(10), which tests the factual support for a claim." *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition under MCR 2.116(C)(10) should be granted where the affidavits or other documentary evidence show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). To avoid summary disposition under MCR 2.116(C)(10) the party opposing the motion must show, via affidavit or documentary evidence, that a genuine issue of fact exists for trial. *Id.* at 455-456 n 2; MCR 2.116(G)(4).

Plaintiff's claim raises issues regarding the proper interpretation of an insurance contract. The purpose of interpreting any contract is to determine and enforce the intent of the parties. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 63 (2000). A court must construe an insurance policy as written and attempt to apply the plain language of the agreement if possible. See *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000); *Farm Bureau Mutual Insurance Co v Nikkel*, 460 Mich 558, 566-568; 596 NW2d 915 (1999). In *Nikkel* the Court wrote:

> "Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy." To determine otherwise would hold an insurer liable for a risk it did not assume. [*Id.* at 568 (citation omitted).]

In the present case, the plain language of the policy excludes liability coverage for claims made against an insured because of bodily injury or property damage "[a]rising out of or in connection with a business engaged in by an insured."

The well-established test to determine a business pursuit is an activity "engaged in continually and for profit." *State Mut Ins Co v Russell*, 185 Mich App 521, 529; 462 NW2d 785 (1990). "The complained-of acts themselves need not be performed for profit; the acts need only be performed during the business pursuit of the insured." *Greenman v Michigan Mut Ins Co*, 173 Mich App 88, 94; 433 NW2d 346 (1988) (citation omitted).

Defendant, however, argues that the policy at issue here is narrower than the policy language to which this Court has previously applied the "business pursuits" test, arguing instead

that the policy language in the present case is more analogous to that in *Van Hollenbeck v Ins Co of North America*, 157 Mich App 470; 403 NW2d 166 (1987), where this Court determined that the trial court erred in excluding coverage. We believe that *Van Hollenbeck* is inapposite. The policy at issue in *Van Hollenbeck* excluded coverage "to any BUSINESS OR BUSINESS PROPERTY (other than farms) *of an INSURED* . . . ." *Id.* at 476 (emphasis added). The emphasized language implies that the policy exclusion applied only to a business or business property owned by the insured and, therefore, justified the narrower application than that of the "business pursuits" test. The language of the policy exclusion at issue in the present case is much broader in that it excludes coverage for any bodily injury or property damage "arising out of or in connection with a business engaged in by an insured." Thus, applied to the policy language at issue, defendant's argument that the lack of the term "business pursuits" prevents application of the "business pursuits" test is a distinction without a difference.

There is no genuine issue of material fact that the Toughman Contests at issue were commercial enterprises designed to earn a profit. The record evidence demonstrates that, at the time of the Toughman Contests that led to the three underlying lawsuits, defendant was president of the ABAA, which did business as the Toughman Contest and was bound by its licensing agreement, signed by defendant, to "use commercially reasonable efforts to promote and advertise" the Toughman contest. Although plaintiff may not have been paid for his activities in organizing and promoting the tournaments, the tournaments themselves were for-profit business activities in which defendant had been engaged on a continuous basis since 1979. Moreover, the ABAA's status as a nonprofit corporation does not mean that it is not a "business" within the meaning of the policy.[2] Likewise, the fact that defendant was not being paid for the specific acts he performed in connection with the contests does not mean that he was not engaged in a business activity at the time the underlying plaintiffs were injured. *Greenman*, *supra* at 94. To hold otherwise "would exalt form over substance." *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Plaintiff did not intend to insure defendant against risks inherent in business activities, let alone risks inherent in substandard, amateur fighting tournaments.

We, therefore, hold that defendant's liability coverage for the three underlying cases is precluded by the business exclusion in his homeowner's policy. In light of this holding, it is unnecessary to address plaintiff's argument that the trial court erred in finding that the injuries were "occurrences" that were not the result of defendant's intentional actions. On remand, plaintiff is entitled to judgment in its favor, but we express no opinion regarding plaintiff's claim for costs because plaintiff failed to brief this issue in its application for leave to appeal. Failure to brief an issue abandons it on appeal. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002).

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[2] The policy defines "business" as including "trade, profession or occupation," but these terms are not further defined. According to its plain, ordinary meaning, "occupation" refers to "a person's usual or principal work" or "any activity in which a person is engaged." Random House Webster's College Dictionary. Thus, the policy contains no requirement of a profit motive to qualify as "a business engaged in by an insured."

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michael J. Talbot